apparently sufficient,[13] especially under statutes which place on them no obligation to subscribe, leaving them little more than subscription agents.[14] Under such a statute in Ohio a corporation formed by persons connected with a law firm in the interest of three other corporations, who subscribed to the stock, was held to have an existence, *de facto* at least in the recent case of *Kardo Co.* v. *Adams* (C. C. A. 6th Cir. Feb. 18, 1916) not yet reported. This decision, like many others on this subject,[15] needed to establish a corporation *de facto* only, the existence of which is recognized by the federal courts in spite of lack of capacity on the part of the incorporators.[16] But Judge Hollister in his opinion seems to regard the method of incorporation as satisfying the requirements of the statute.[17] This appears in keeping with authority and with the policy of the law, which recognizes the importance for industrial development of allowing one corporation to control another by stock ownership.[18] If a corporation may purchase the control of an existing corporation adapted to its needs, it is equally essential that it may instigate the organization of a new corporation to answer this need when none already exists.[19] The only method possible, and the one sanctioned by general business usage and judicial acceptance, is through the medium of agents.

Liquidation and Dissolution of National Banks.—One of the various means by which it is sometimes said that a corporation may be dissolved is a voluntary dissolution by vote of the stockholders.[1] By the weight of authority, however, such a resolution by the stockholders will not, in itself, dissolve a corporation, but dissolution must be perfected by the decree of a competent court or by a special act of the

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[13]Irvine Co. *v.* Bond, *supra*; State *v.* Superior Ct. (1908) 49 Wash. 390, 95 Pac. 490; State *v.* Miner (1911) 233 Mo. 312, 135 S. W. 483; but see Wechselberg *v.* Flour City Nat. Bank (C. C. A. 7th Cir. 1894) 64 Fed. 90.

[14]See Chase *v.* Lord (1879) 77 N. Y. 1; Densmore Oil Co. *v.* Densmore (1870) 64 Pa. 43; 1 Cook, Corporations (6th ed.) § 2.

[15]National Docks Ry. *v.* Central R. R. of N. J., *supra*; Windsor Glass Co. *v.* Carnegie Co. (1903) 204 Pa. 459, 54 Atl. 329.

[16]Toledo, St. L. & K. C. R. R. *v.* Continental Trust Co. (C. C. A. 6th Cir. 1899) 95 Fed. 497, *certiorari* denied (1900) 176 U. S. 219, 20 Sup. Ct. 383.

[17]There is seldom any intimation that the courts believed these corporations subject to attack by the state, and examples of successful proceedings against them in *quo warranto* are lacking.

[18]The danger of monopoly resulting is obviated by the anti-trust laws, as well as by the tendency of the courts to deny a corporation's rights to buy stock in cases where public policy would be opposed. People *v.* Chicago Gas Trust Co., *supra*; Central R. R. *v.* Collins, *supra*; see Merz Capsule Co. *v.* U. S. Capsule Co. (C. C. 1895) 67 Fed. 414.

[19]Niemeyer *v.* Little Rock Junction Ry. (1884) 43 Ark. 111; National Docks Ry. *v.* Central R. R. of N. J., *supra*; Oregon S. L. R. R. *v.* Postal Tel. Cable Co. (C. C. A. 9th Cir. 1901) 111 Fed. 842; Postal Tel. Cable Co. *v.* Oregon S. L. R. R., *supra*; Parkside Cemetery Assn. *v.* C. B. & G. L. Traction Co. (Ohio Sup. Ct. Dec. 7th, 1915) not yet reported; but see Baltimore & Ohio Tel. Co. *v.* Interstate Tel. Co. (C. C. A. 4th Cir. 1893) 54 Fed. 50; *In re* Muncie Pulp Co. (C. C. A. 2nd Cir. 1905) 139 Fed. 546, *certiorari* denied *sub nom.* Gt. Western etc. Co. *v.* Oppenheimer (1906) 202 U. S. 621, 26 Sup. Ct. 766.

[1]See 2 Cook, Corporations (6th ed.) § 628.

legislature.[2] The confusion that has to some extent existed on this point has probably been due to a failure to distinguish carefully between the strict meaning of dissolution as the complete extinction of the corporation, terminating all its proceedings and activities, and a looser and somewhat frequent use of the term as indicating any act or omission from which a dissolution will ultimately result.[3] The distinction is an important one, especially under the common law rule that the dissolution extinguished all debts due to or from the corporation,[4] a result that rested upon the conception that there remained no legal person capable of suing or of being sued. This harsh doctrine has, however, been somewhat modified by statutes providing for a period of some two or three years after dissolution during which the corporation may still sue or be sued in its corporate name.[5]

These general principles concerning the dissolution of corporations have been consistently applied to national banks. In some respects their application has been relieved of doubt by the explicit provisions of the National Bank Act.[6] Thus, there has been great difficulty in determining whether an ordinary corporation can initiate voluntary dissolution by anything less than the unanimous vote of its stockholders.[7] A national bank, however, may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.[8] This is an absolute right and may be exercised contrary to the wishes and against the interest of the minority stockholders,[9] who are entitled only to such disposition of assets as will subserve the best interests of all, and who have no right to complain of the action taken pro-

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[2]Lake Ontario Nat. Bank *v.* Onondaga County Bank (N. Y. 1876) 7 Hun 549; Beyer *v.* Woolpert (1906) 99 Minn. 475, 109 N. W. 1116; see Boston Glass Mfy. *v.* Langdon (1834) 41 Mass. 49; but see Mumma *v.* Potomac Co. (1834) 33 U. S. 281. Some courts have laid down the broad proposition that, since a corporation owes it existence to an act of the sovereign power, it can in no case be destroyed except by that same power acting through its legislature or judiciary. See Denike *v.* N. Y. etc. Co. (1880) 80 N. Y. 599. It is certainly well recognized that a dissolution is not effected by insolvency and the appointment of a receiver, Stolze *v.* Manitowoc Terminal Co. (1898) 100 Wis. 208, 212, 75 N. W. 987; Chemical Bank *v.* Hartford Deposit Co. (1895) 161 U. S. 1, by an assignment of its property to trustees to pay its debts, De Camp *v.* Alward (1876) 52 Ind. 468, 473, nor by the sale of its property and cessation of business. See De Camp *v.* Alward, *supra*.

[3]The phraseology of the statutes frequently gives rise to an ambiguity on this point. Thus, the National Bank Act, Rev. Stat., § 5136, provides that the bank "shall have succession for twenty years unless sooner *dissolved* . . . by the act of its shareholders, etc."

[4]See Port Gibson *v.* Moore (1849) 21 Miss. 157; Hightower *v.* Thornton (1850) 8 Ga. 486, 492; Ramsey *v.* Peoria etc. Co. (1870) 55 Ill. 311, 315.

[5]Ramsey *v.* Peoria etc. Co., *supra*; Ferguson *v.* Miners' & Mfrs.' Bank (1856) 35 Tenn. 609, 633; Bewick *v.* Alpena Harbor Co. (1878) 39 Mich. 700; *cf.* Bish *v.* Bradford (1861) 17 Ind. 490, 494; N. Y. etc. Works *v.* Smith (N. Y. 1855) 4 Duer 362.

[6]Rev. Stat., Tit. LXII.

[7]That an unanimous vote is necessary, see Barton *v.* Enterprise Loan & Bldg. Assn. (1887) 114 Ind. 226, 16 N. E. 486; *contra*, State *v.* Chilhowee etc. Co. (1905) 115 Tenn. 266, 89 S. W. 741; see Price *v.* Holcomb (1893) 89 Iowa 123, 56 N W. 407.

[8]Rev. Stat., § 5220; 5 Fed. Stat. Ann. 166.

[9]Watkins *v.* Nat. Bank (1893) 51 Kan. 254, 32 Pac. 914.

vided sales of corporate assets are made for full value.[10] Moreover, the right of voluntary liquidation is not limited to cases of insolvency but may be exercised whenever the holders of two-thirds of the stock for any reason deem it advisable.[11] In accord with the general rule already laid down, it has repeatedly been held that such liquidation does not in itself effect a dissolution, but that the corporation still continues and may sue and be sued in its corporate name.[12]

As a matter of convenience and facility in winding up the corporate affairs after the shareholders have voted to go into voluntary liquidation, a liquidating agent or committee is frequently appointed. The authority of such agents may be as extensive as that ordinarily vested in the officers and directors.[13] The general scope of the power and the nature of their obligations and duties, therefore, closely resemble those of a receiver, who supersedes the directors in the exercise of the incidental powers necessary to carry on the business of banking.[14] It is to be noted, however, that, even after the appointment of a receiver, the bank may still sue and be sued in its corporate name.[15] Moreover, a receiver is empowered by statute to displace the officers and directors in the management of corporations, whereas an agent in liquidation, though commonly employed by liquidating banks and long recognized as permitted by law, is a person unknown to the statute.[16]

Whether or not, because of the nature of his office and duties, he should be recognized by the courts as displacing the directors in a manner similar to that of a receiver is a question for the first time squarely raised by the recent case of *Planten* v. *National Nassau Bank* (Sup. Ct. 1916) 157 N. Y. Supp. 31. In that case, following a voluntary dissolution under § 5220 of the National Bank Act, a liquidating committee was appointed. A stockholder sued the directors for waste of assets by mismanagement and the defendant demurred on the ground that a demand should have been made upon the liquidating committee to bring the action. The court, after reiterating the well established doctrine that liquidation does not effect a dissolution, held that the liquidating committee did not supersede the directors as the controlling authority of the corporation, hence no demand upon such

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[10]Green *v.* Bennett (Tex. Civ. App. 1908) 110 S. W. 108.

[11]Green *v.* Bennett, *supra.*

[12]Farmers Nat. Bank *v.* Suther (1911) 28 Okla. 806, 116 Pac. 173; Nat. Bank *v.* Ins. Co. (1881) 104 U. S. 54; Chemical Bank *v.* Hartford Deposit Co., *supra*; Merchants' Nat. Bank *v.* Gaslin (1889) 41 Minn. 552, 43 N. W. 483; but see Hodgson *v.* McKinstrey (1895) 3 Kan. App. 412, 42 Pac. 929.

[13]See Jewett *v.* United States (1900) 100 Fed. 832, 839.

[14]See Bank of Bethel *v.* Pahquioque Bank (1871) 81 U. S. 383, 400.

[15]Bank of Bethel *v.* Pahquioque Bank, *supra*; Chemical Bank *v.* Hartford Deposit Co., *supra*; *cf.* Herron *v.* Vance (1861) 17 Ind. 595; but *cf.* Myers *v.* Hettinger (1899) 94 Fed. 370; Murray *v.* Chambers (1907) 151 Fed. 142.

[16]See United States *v.* Jewett (1897) 84 Fed. 142; Jewett *v.* United States, *supra*, p. 838. This case furnishes an interesting discussion of the nature of the agency of a liquidating agent. There is, however, another kind of agent provided for under the Act of June 30, 1876, Ch. 156; 19 Stat. 63. This agent displaces a receiver and is really but a receiver under a different name. See McConville *v.* Gilmour (1888) 36 Fed. 277; Jewett *v.* United States, *supra*, p. 840.

committee was necessary. This decision gives rise to a somewhat anomalous situation. A receiver admittedly displaces the directors; yet a liquidating agent, who performs essentially the same duties and is subject to practically the same liabilities, is almost unrecognized. Nevertheless, it is submitted that the decision is both logically correct and expedient. When a corporation is created, authority and control thereof are vested in the hands of the directors. There they should remain until removed pursuant to the authorization of the same sovereign power that imposed them. Such authorization exists in the case of a receiver; it does not exist in the case of a liquidating agent. This ruling conforms to the established principles of the law of corporations and at the same time in no wise impairs the usefulness of such agents, as auxiliary instrumentalities, in the discharge of the duties for which they are appointed.

COSTS AS INDEMNITY FOR LITIGATION.—Although the recovery of costs, as such, by either party was unknown to the common law,[1] yet they were in reality always considered and included in the quantum of damages in such actions where damages were recoverable.[2] Statutes, however, were early passed in England which gave to either the plaintiff or defendant according as the one or the other prevailed in an action, the right to recover costs.[3] Nevertheless it continued to be the practice, after the passing of these acts, for the jury to assess a nominal sum in addition to the actual damages, and for the court then to tax the costs of the parties. This was the origin of costs *de incremento*.[4] While the right of the jury to take into consideration the costs of the litigants is unknown in the United States, the power to award costs is given to the courts under widely prevalent statutes.[5] As, by the common law, the recovery of costs by that name was not recognized until provided by statute, it became the settled doctrine that the allowance of costs depends entirely upon the terms of the statutes of the jurisdiction.[6]

A slight modification of this rule is illustrated in the recent case of *Comstock's Adm'r.* v. *Jacobs* (Vt. 1915) 96 Atl. 4. Under the

[1]Milliman, Law of Costs, § 2. If the plaintiff failed to recover he was "amerced *pro falso clamore*"; if he recovered judgment the defendant was "*in misericordia*" for his unjust detention of the plaintiff's right. See Day *v.* Woodworth (1851) 54 U. S. 363, 372; State *v.* Board of Commissioners (1897) 14 Ohio Cir. Ct. 26.

[2]3 Bl., Comm., *399; Hullock, Law of Costs, 3; see Kiersted *v.* Rogers (Md. 1824) 6 Harr. & J. 282.

[3]Hullock, Law of Costs, 4; see Lehigh Valley R. R. *v.* McFarland (1882) 44 N. J. L. 674. The statute of Gloucester, 6 Edw. I, c. 1, gave to the plaintiff costs in all cases where he recovered damages. The statute of 23 Hen. VIII, c. 15, together with subsequent acts, gave to a defendant the same costs to which a plaintiff would be entitled had he prevailed. Hullock, Law of Costs 4, 124, *et seq.*

[4]See Kiersted *v.* Rogers, *supra*; Day *v.* Woodworth, *supra*; 6 Vin. Abr. 322. Costs *de incremento* are "the costs adjudged by the judge in civil actions in addition to the damages and nominal costs found by the jury". English Law Dictionary 222.

[5]See for instance Mass. Rev. Stat. 1902, c. 203, § 1 *et seq.*; N. Y. Code Civ. Proc., § 3228 *et seq.*

[6]Peay *v.* Pulaski County (1912) 103 Ark. 601, 148 S. W. 491; Phillips *v.* Corbin (1898) 25 Colo. 567, 56 Pac. 180.